

**Before The
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Schools and Libraries Universal Service Support Mechanism)	CC 02-6
)	
Further Notice of Proposed Rulemaking)	FCC 03-101
)	

**COMMENTS OF THE
CONSORTIUM FOR SCHOOL NETWORKING AND
INTERNATIONAL SOCIETY FOR TECHNOLOGY IN EDUCATION**

Introduction

The Consortium for School Networking (CoSN) and the International Society for Technology in Education (ISTE) are membership-based groups that serve educators who use technology to improve teaching and learning. For nearly a decade, CoSN, whose members include national education associations, local school districts, state education agencies and individual leaders in ed-tech that are committed to integrating technology into the classroom, has been in the forefront of efforts to improve learning in K-12 classrooms via the Internet and telecommunications. ISTE is a nonprofit professional organization with a worldwide membership of leaders in educational technology. ISTE promotes appropriate uses of information technology to support and improve learning, teaching, and administration in K–12 education and teacher education.

CoSN and ISTE have both been active participants before the FCC in proceedings related to the E-Rate, individually and in partnership with EdLiNC, as representatives of many of the thousands of educational institutions that benefit from the E-Rate program. Our participation in

this proceeding reflects our members' commitment to ensuring the long-term viability of universal service as the telecommunications marketplace evolves, and our interest in addressing our concerns regarding the new rules proposed in the Commission's recent Second Report and Order and Further Notice of Proposed Rulemaking (hereinafter the Further Notice) (FCC 03-101), released April 30, 2003.

DISCUSSION

I. Unused Funds Carryover Rules

In the Further Notice, the Commission proposes specific rules implementing its decision to carry forward unused funds for use by schools and libraries in future funding years of the program. As set forth in the Further Notice, the Universal Service Administrative Company (USAC) would provide quarterly estimates regarding the amount of unused funds that will be available to be carried forward and would carry forward available unused funds from prior years on an annual basis for use in the following full funding year. Specifically, USAC would consult with the Schools and Libraries Committee to provide the Commission with an estimate of unused E-Rate funds for each of the prior funding years.

Throughout these proceedings, CoSN and ISTE have expressed strong support for utilizing unused funds to supplement the funds available to schools and libraries in future funding years. CoSN and ISTE support the Commission's proposed unused funds carryover rules. We believe that requiring quarterly estimates will help ensure a rapid reporting schedule that would allow applicants, especially those in the 80%-90% discount rate bracket, to more accurately gauge whether there will be sufficient internal connections funds available to make applying for them worthwhile. With the continuing great need for the E-Rate, as evidenced by the high demand for E-Rate discounts each funding year, we urge the Commission to implement

both these proposed rules and the actual carryover of unused funds as quickly as possible.

Additionally, CoSN and ISTE emphasize the need to ensure that enough funds are available at the end of each year to fully fund all successful appeals.

II. Technology Plan

The Commission also proposes allowing applicants to certify that their technology plans have been approved by the relevant authorities by the time services commence rather than as of the date of the Form 470's filing. Currently, the Commission requires program applicants to base their requests for services on an approved technology plan in order to ensure that services are used in a cost-effective manner. Applicants must certify in their form 470's that their plans have been approved, or are in the process of being approved, by the relevant authorities.

CoSN and ISTE support the Commission's efforts to streamline the application process for schools and libraries but believe it is critical that the program's overall integrity is protected. Although this proposal would provide applicants more time to complete key application steps, we are concerned that this change would undermine the purpose of the technology plan. CoSN and ISTE strongly believe that the adoption and implementation of technology plans is a best practice and will encourage the effective use of E-Rate funds. Because these approved technology plans are intended to serve as guides for technology purchases through the E-Rate, we are concerned that applicants may not be able to make reasoned decisions on equipment purchases without an approved plan in-place. Consequently, we fear that this change could increase the likelihood of wasteful purchasing and contribute to the volume of unused funds accumulating each year. Therefore, CoSN and ISTE are unable to support this proposal.

III. Computerized Eligible Services List

In the Order accompanying the Further Notice, the Commission authorizes USAC to develop a pilot program to create an online computerized list system for internal connections. CoSN and ISTE welcome this pilot and believe that this automated system may prove to be a very helpful, time-saving mechanism for applicants and providers alike. We also support the notions that such a list will operate only as a “safe harbor” and that new technologies not appearing on the list will have an opportunity to gain entry to the list on a timely basis. However, the Further Notice’s proposal to establish a similar list system for telecommunications services and internal connections appears to us to be premature and, therefore, we cannot support it at this time.

In last year’s rulemaking, CoSN and ISTE supported the concept of allowing applicants to apply for E-Rate discounts based on a pre-approved eligible services list because it would reduce instances of applicants seeking support for ineligible services. Nevertheless, we indicated then that we remained concerned about the ability of USAC to update and maintain such a list in a timely fashion. Those concerns persist today. USAC’s completion of Program Year 5 applications just prior to the beginning of Program Year 6 demonstrates that it continues to have significant difficulty processing the high volume of annual E-Rate applications. Saddling USAC with the additional responsibility of developing and maintaining a database of eligible services strikes us as likely adding another burden on USAC, which could exacerbate the slow processing of E-Rate applications.

Before the Commission and USAC embark on new automated system pilot projects for telecommunications services and Internet access services, CoSN and ISTE recommend that it first gain some insight into how well such automated systems work through observing the

operation of the recently approved automated internal connections pilot program. Through the current internal connections pilot program, we believe that the Commission will not only be able to gauge USAC's ability to develop and maintain such a system, but that it will be able to assess the effects such a system may have on applicant choice of services and vendor development of new services.

IV. Other Measures to Prevent Waste, Fraud and Abuse

Finally, the Further Notice proposes additional penalties to redress repeated instances of fraud and abuse that may fall short of criminal convictions or civil judgments but that may nevertheless warrant debarment.

A. Adoption of Government-Wide Debarment Rules

The first proposal references a pending federal government Notice of Proposed Rulemaking that proposes to allow independent regulatory agencies, such as the FCC, to elect to participate in government-wide debarment rules that would allow a federal agency or executive department to debar or suspend any person from participating in programs or activities if that person has been debarred or suspended by another federal agency or department. Thus, as we understand it, if the FCC agrees to participate in this program, it would be required to bar from E-Rate program participation those companies or individuals that have been barred from participating in other federal government programs, and vice versa.

Over the course of many years of filings, CoSN and ISTE have supported providing the Commission with the enforcement tools necessary to protect the integrity of the program. This proposal, though, seems to us a very blunt instrument that is capable of doing more harm than

good. First, the E-Rate program differs dramatically from traditional government procurement programs in many regards, making the E-Rate program a very poor fit for these government-wide debarment rules. To cite the most obvious example of this difference, E-Rate funds are not federal funds; rather, E-Rate funds are collected through a service fee, and administered by SLD.

Second, ISTE and CoSN believe that there are some basic fairness considerations that the Commission should consider before linking the E-Rate to a government-wide debarment program. For example, if the E-Rate program becomes a participant in the federal debarment program, it is conceivable that a small division of a large corporation could be barred by another agency, thereby causing the entire corporation to be barred from participation in the E-Rate program. Such an outcome is not only unfair to the provider but also to applicants, who would see their choice of service providers inexplicably reduced. Based on these concerns, CoSN and ISTE oppose E-Rate participation in the federal debarment program.

B. Debarring Willful or Repeated Violators

The second proposal would permit the Commission to debar applicants for willful or repeated violations in those instances in which applicants are not convicted or held civilly liable for actions associated with the E-Rate. The "willful or repeated" standard is based upon existing Commission forfeiture authority under section 503(b). The Commission proposes to define "willful" as "the conscious and deliberate commission or omission of any act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States." It proposes to define "repeated" as "the commission or omission of any act more than once or, if such commission or omission is continuous, for more than one day."

In our previous comments, CoSN and ISTE supported the concept of debarring from program participation those entities that repeatedly and knowingly violate program rules. Therefore, we gladly support the Commission's proposed definitions of "willful" and "repeated" and endorse a rule allowing the Commission flexibility to debar persons who willfully and repeatedly violate the integrity of the program.

Nevertheless, we feel it important to note that the establishment of any sanctions system must be premised on clearly defined rules and guidelines. Without clarity in program rules, we believe that applicants and vendors would lack adequate notice of the program's parameters and that punishing them for rule transgressions would be unfair. Therefore, we urge that the Commission adopt well-defined program rules and conduct outreach to the applicant and vendor communities to ensure that they are cognizant of these rules' substance.

C. Determination of Violations Resulting in Debarment

The Further Notice seeks to determine at what point an applicant's willful or repeated violation of the rules threatens to undermine program integrity. Accordingly, CoSN and ISTE recommend that only significant violations should be sufficient to warrant debarment; inadvertent violations of program rules, particularly those that result from ambiguity in the program's rules, should not be redressed by heavy sanctions such as debarment. We believe that significant rules may be defined to include those rules that relate to key components of the program, such as the application process, the competitive bidding process, the setting of discount rates, the delivery of services, and the misuse of services.

CoSN and ISTE also encourage the Commission to examine the totality of the circumstances in each case of alleged program rule violations in order to determine if a person's

activities in relation to the E-Rate rise to the level of undermining program integrity. Several of the factors the Commission should consider in this determination include: 1) the magnitude of the sums involved; 2) the intent of the person accused of the rules violation; 3) the number of times violations of a single rule have occurred and/or the number of violations of multiple rules have occurred; and 4) any previous episodes of rule violations by the person accused, especially any pattern of violations.

Beyond clear rules and a case-by-case analysis, CoSN and ISTE also support a graduated system of punishment to ensure that sanctions for E-Rate violations are meted out in a manner proportional to the offense. In our previous filings on this issue, CoSN and ISTE proposed such a system. At that time, we noted that such a system should not punish applicants and vendors for violations that amount to mere mistakes or poor judgment. Under the system that we proposed, entities whose mistakes only rose to the level of misfeasance would sustain less severe penalties, such as warnings or reductions in discount rates. Entities who engaged in willful, intentional, and/or repeated rule violations, though, would face much sterner sanctions, including being barred from the program and, in extreme cases, being banished from it. The system also took into account that punishments for applicants and vendors must be different in order to prevent harm to the communities and students served by schools and libraries. Thus, sanctions for applicants largely entailed discount rate reductions rather than debarments for periods of years.

The sliding scale of violations – ranging from Class 1 (least severe) to Class 5 (most severe) – that CoSN and ISTE proposed and which they still support appears below:

- **Class 1:** A violation should be placed in Class 1 if it is deemed “an honest mistake” – a Class 1 violation should be a minor infraction of the rules by a first-

time offender with no evidence of any willful or intentional act of deception. The punishment for a Class 1 violation should be a warning.

- **Class 2:** A violation should be placed in Class 2 if it constitutes a significant infraction of the rules, or is a minor infraction committed by an offender with a prior warning. There should be no evidence of any willful or intentional act of deception, but sufficient evidence that the entity's action was the result of poor judgment or misfeasance. The punishment for a class 1 violation should be a 25% reduction in the discount rate for applicants. Some form of suspension for a service provider offender might be appropriate here.
- **Class 3:** A violation should be placed in Class 3 if it constitutes a severe infraction of the rules, or multiple minor infractions of the rules, or if there is some evidence or question indicating that the offender willfully or intentionally violated the rules. The punishment for applicants should be a reduction in the discount rate by 50% - 75%, as deemed appropriate by the Commission. If the entity has committed a prior violation, the penalty may be assessed for more than one year, in a manner proportional to the financial gravity of the violation. If the penalty is imposed for more than one year, the percentage of the reduction in the discount rate may be decreased each year at the discretion of the Commission. Again, some form of suspension for a service provider offender might be appropriate here.
- **Class 4:** A violation should be placed in Class 4 if it constitutes a severe infraction of the rules, or multiple minor infractions of the rules, if there is evidence that the offender committed the violations knowingly and intentionally.

The punishment should be a 1-year suspension from participation in the program.

If the entity is an applicant and has previously committed an infraction of the rules, the Commission may impose a reduction in the discount rate of not more than 75% in the year following completion of the suspension, 50% in the second year following suspension, and 25% in the third year following suspension.

- **Class 5:** A violation should be placed in Class 5 if it constitutes a severe infraction of the rules, or multiple minor infractions of the rules, the offender has repeatedly violated the rules in the past, there is evidence that the offender committed the violations knowingly and intentionally, and it is believed that the offender will continue to violate the rules in the future. The punishment should be a permanent ban from participation in the program.

D. Notification Procedures for Debarment.

Prior to debarment, the Commission proposes giving notice to a targeted applicant by: 1) providing the reasons for the proposed debarment in terms sufficient to put the person on notice of the conduct or transactions(s); 2) explaining the applicable debarment procedures; and 3) describing the potential effect of debarment. The person would be given 30 days from when the notice was published to respond and submit information and argument.

CoSN and ISTE support the notification procedures set forth in the proposal. To ensure that this process is fair to all individuals and entities, the 30-day period to respond and submit appeal information is essential. In order to protect the reputations of targeted applicants, CoSN and ISTE urge that all debarment notifications be maintained confidentially by the Commission until all appeals have been exhausted and debarment occurs.

E. Other Grounds for Debarment

In response to the Commission's inquiry regarding whether to debar persons who, in the course of participating in the program, commit any other act indicating a lack of business integrity or business honesty that seriously affects the present responsibility of the person, CoSN and ISTE oppose such a rule. While CoSN and ISTE have consistently supported giving the Commission the necessary flexibility to combat waste, fraud and abuse, the Further Notice does not make sufficiently clear what actions would constitute dishonesty or a lack of integrity. Most importantly, the Commission's proposal does not insist that any such disqualifying action have any bearing on the program. Short of a specific connection to the program, CoSN and ISTE are leery of debarring an individual for acts unrelated to the E-Rate program.

F. Imputation of Debarment.

In order to protect the integrity of the program, the Commission also seeks to determine rules for imputation from one person or entity to another. Under the Commission's proposed rules, the conduct of a person or entity could be imputed to another person when the conduct occurs in connection with the former's performance of duties for or on behalf of the latter, or with the latter's knowledge, approval or acquiescence.

Because CoSN and ISTE agree that there may be instances where individuals knowingly derive benefits from the wrongdoing of others, we support the Commission's proposed rules on imputation of conduct from one person to another. However, while we believe that the process of imputing responsibility for rule violations to various individuals within vendor and applicant entities is the same, we believe that the penalties sustained by these two very different types of

entities must be necessarily different. Schools and libraries are entities vastly different than corporate vendors: the former are publicly funded institutions that are responsible to the communities that they serve, whereas companies major allegiances lie, by dint of their charters, with their shareholders. Debarring an entire school or an entire library for several years because of the actions (direct or imputed) of its leaders not only punishes individual bad actors but also, in our view, disproportionately penalizes the community that such institutions serve. Therefore, in order to protect innocent community members and students from being unfairly punished in imputation violation scenarios, we recommend that the Commission limit the duration and scope of school and library punishments in accordance with the graduated sanctions system we set forth above in Section C.

F. Effect of Debarment.

The Commission also seeks to determine what effect, if any, suspension or debarment of a person should have with regard to the person's participation in other activities associated with the Commission. Although CoSN and ISTE recognize the Commission's need to retain flexibility in this determination, given the realities of the limited number of vendors in certain areas of the country, it may not be feasible to bar entities from participation in all activities associated with the Commission. Additionally, we fear that such a rule might cause some vendors to shy away from participating in the E-Rate program at all for fear of risking their ability to participate in other universal service programs.

G. Changing Service Providers Post-Debarment.

Finally, the Commission seeks to determine how to treat applicants whose service provider has been debarred prior to the issuance of a funding commitment decision. CoSN and ISTE believe that the Commission should permit applicants whose service provider has been debarred to have the flexibility to change providers before a funding commitment decision has been issued – or after the last date for invoices. Considering the budgetary constraints most schools districts face, denying schools this flexibility would provide an undue burden and unfairly punish schools who have not acted to compromise the integrity of the program.

CONCLUSION

CoSN and ISTE appreciate the Commission's work on these critical E-Rate issues and are particularly heartened that the Commission is finally taking steps to deter waste, fraud and abuse by sanctioning program rule violators. We look forward to continuing to assist and advise the Commission in this important undertaking.

Dated: July 21, 2003

Respectfully submitted,

INTERNATIONAL SOCIETY FOR
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